

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0182
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SHILOE DOMINIQUE ESPINOZA,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102204002

Honorable Edgar B. Acuña, Judge

VACATED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Shiloe Espinoza was convicted of theft of a means of transportation and sentenced to 6.5 years in prison. On appeal, Espinoza argues, and the state agrees, she was improperly convicted of an offense not charged, because theft of a means of transportation is not a lesser-included offense of aggravated robbery, the offense with which she was charged. We agree and therefore vacate Espinoza’s conviction and sentence.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the verdicts.” *State v. Alvarez*, 228 Ariz. 579, ¶ 2, 269 P.3d 1203, 1204 (App. 2012). The victim, S., testified he had left his van running and unlocked while he was filling water containers at a convenience store. He stated that as he was filling a container a man hit him on the neck and got into the van. S. testified that Espinoza blocked S. from getting to the van and climbed into the passenger’s seat before the man drove away. However, S. also acknowledged he had not told the investigating detective that Espinoza had blocked his way or that the man had hit him in the neck.

¶3 Espinoza was charged with aggravated robbery as an accomplice. Over Espinoza’s objection, the trial court instructed the jury on theft of a means of transportation as a lesser-included offense of aggravated robbery. The jury found Espinoza guilty of theft of a means of transportation and the court sentenced her to a 6.5-year prison term. This appeal followed.

Discussion

¶4 Espinoza argues she was erroneously convicted of the crime of theft of a means of transportation as a lesser-included offense of the charged crime of aggravated robbery. She reasons the theft charge has additional elements not required under the definition of aggravated robbery. The state agrees the trial court erred in “instructing the jury that theft of means of transportation was a lesser-included offense of aggravated robbery.” The question of whether one crime is a lesser-included offense of another crime is a matter of statutory interpretation, which we review de novo. *In re James P.*, 214 Ariz. 420, ¶ 12, 153 P.2d 1049, 1052 (App. 2007).

¶5 Arizona courts use two tests to determine whether one crime is a lesser-included offense of a greater crime: “the ‘elements’ test and the ‘charging documents’ test.” *State v. Larson*, 222 Ariz. 341, ¶ 7, 214 P.3d 429, 431 (App. 2009). We first analyze this offense under the elements test. *See generally id.* A lesser-included offense under the elements test is an offense “‘composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.’” *State v. Cheramie*, 218 Ariz. 447, ¶ 9, 189 P.3d 374, 375-76 (2008), *quoting State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). Therefore, the lesser crime must be composed of some of the elements of the greater crime and may not have any additional elements. *See Larson*, 222 Ariz. 341, ¶ 8, 214 P.3d at 431.

¶6 In Arizona, an individual commits robbery “if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.” A.R.S. § 13-1902(A). The offense of robbery is aggravated if the defendant “is aided by one or more accomplices actually present.” A.R.S. § 13-1903(A). A person commits the crime of theft of a means of transportation if the person knowingly and without lawful authority “[c]ontrols another person’s means of transportation with the intent to permanently deprive the person of the means of transportation.” A.R.S. § 13-1814(A)(1).

¶7 Because the definition of theft of a means of transportation specifies the property stolen be a “means of transportation” and also requires “intent to permanently deprive,” it requires two additional elements that are not required under the definition of aggravated robbery. *Compare* § 13-1814(A)(1), *with* § 13-1902(A), *and* § 13-1903(A). Thus, theft of a means of transportation is not a lesser-included offense under the elements test. *See Larson*, 222 Ariz. 341, ¶ 8, 214 P.3d at 431.

¶8 However, even if a crime is not a lesser-included offense under the elements test, it may be so under the charging-documents test. *See id.* ¶ 13. An offense is a lesser-included offense under the “‘charging documents’ test . . . if ‘the charging document describes the lesser offense even though the lesser offense would not always form a constituent part of the greater offense.’” *Id.*, *quoting In re Jerry C.*, 214 Ariz. 270, ¶ 11, 151 P.3d 553, 556-57 (App. 2007). In applying this test, “courts have focused on

language that explicitly alleged the defendant’s conduct or mental state” when finding that lesser offenses had been described by the charging document. *State v. Garcia*, 176 Ariz. 231, 233, 860 P.2d 498, 500 (App. 1993).

¶9 The indictment charged Espinoza with aggravated robbery and stated, “On or about the 26th day of May, 2010 . . . Espinoza robbed [S.], while aided by one or more accomplices actually present” This description does not state that Espinoza robbed S. of his “means of transportation,” his van, and it also does not describe Espinoza’s intent as being “to permanently deprive” S. of the van. Therefore, the indictment does not describe the crime of theft of a means of transportation and it cannot be a lesser-included offense of aggravated robbery under the charging-documents test. *See Larson*, 222 Ariz. 341, ¶ 13, 215 P.3d at 432. As the parties agree, the trial court erred by allowing Espinoza to be convicted of the uncharged offense of theft of a means of transportation.

¶10 The state contends we “should remand this case for a new trial.” However, when a defendant is convicted of a lesser-included offense in error, this court will vacate the conviction and sentence. *See, e.g., id.* ¶¶ 18, 24 (vacating conviction when defendant convicted of offense which did not qualify as lesser-included); *cf. In re Jeremiah T.*, 212 Ariz. 30, ¶¶ 13-14, 126 P.3d 177, 181 (App. 2006) (vacating when juvenile adjudicated delinquent on offense different from that charged).

¶11 The state also argues the prohibition against double jeopardy does not prevent a new trial on aggravated robbery. Espinoza counters that it does. But we will

not issue advisory opinions on situations which may or may not occur. *State v. Bernini*, 220 Ariz. 536, ¶ 10, 207 P.3d 789, 792 (App. 2009). When a conviction is vacated, the state must elect whether to retry a defendant if permitted.¹ See *State v. Sprang*, 227 Ariz. 10, ¶ 19, 251 P.3d 389, 394 (App. 2011). And the prohibition against double jeopardy “is not violated absent threat of either multiple punishment or successive prosecutions.” *State v. Guerra*, 161 Ariz. 289, 292, 778 P.2d 1185, 1188 (1989). Because we do not know whether the state will prosecute Espinoza for aggravated robbery again, and we will not issue advisory opinions, we do not reach this issue. See *United States v. Corona*, 34 F.3d 876, 882 n.5 (9th Cir. 1994) (double jeopardy claim not ripe until government “attempt[s] a second prosecution”); see also *Abney v. United States*, 431 U.S. 651, 661-62 (1977) (permitting pre-trial review of double jeopardy challenge to indictment). Moreover, we repeatedly have held that “the appropriate vehicle” for a double jeopardy claim is a petition for special action after the initiation of a second proceeding. *State v. Wilson*, 207 Ariz. 12, ¶¶ 2-3, 6, 82 P.3d 797, 798-99 (App. 2004), quoting *Nalbandian v. Superior Court*, 163 Ariz. 126, 130, 786 P.2d 977, 981 (App. 1989).²

¹We note the Pima County Attorney’s Office will be the entity deciding whether to re-charge Espinoza with aggravated robbery.

²A defendant also may raise a double jeopardy claim by appeal. *State v. Felix*, 214 Ariz. 110, ¶¶ 6-11, 149 P.3d 488, 489-90 (App. 2006).

Conclusion

¶12 For the foregoing reasons, we vacate Espinoza's conviction and sentence.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge